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CHARLES ELMORE

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1932.

No. 8.

NATIONAL SURETY COMPANY, et al.,
Petitioners
(Appellants Below),

vs.

VALERIA E. CORIELL,
Respondent
(Appellee Below),

MORRIS WHITE, INC.,
Respondent
(Appellee Below),

IRVING TRUST COMPANY, as Receiver of Morris White, Inc.,
Respondent
(Appellee Below),

MICHAEL HOLLANDER, et al., Constituting a Committee of Creditors of Morris White, Inc.,
Respondent
(Appellee Below).

PETITIONERS' REPLY BRIEF.

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PETITIONERS' REPLY BRIEF.

I.

As to the Respondents' Statement of Facts.

The respondents' brief, in its statement of facts, selects various *ex parte* assertions in self-interested *talk* before the District Court and presents these hearsay

remarks, opinions, guesses and prophecies as if they were proven facts competently established and a proper record upon which the District Court could base its decree.

In our Main Brief at page 16 we have anticipated this method of creating a so-called "Statement of Facts", and we have there shown that before the District Court and the Court of Appeals we repeatedly and strenuously objected to the acceptance of mere self-interested and hearsay declarations as competent proof; that the only *affidavits* submitted were submitted by us; and that in any legal sense there was no real or competent proof before the District Court justifying the acceptance of the White offer.

Before the District Court, for the very purpose of testing out the truth of these assertions and of ascertaining the actual facts, we repeatedly sought a fair opportunity to examine into the situation judicially (R., 58, 62, 63, 54, 71, 66). As Mr. Tuttle then said (R., 58):

> "Mr. Tuttle: What we want, these creditors whom I represent, is a fair opportunity to examine, under oath, the people who have appeared, about this complete 100 per cent financial bankruptcy. We do not want to have any proposed offer of settlement put over on us by any group, large or small. That is why we are opposing this. How about the assets? What is the suggestion by means of which we can know what is really being done here. We are asked to take a pig in a poke, and a big pig. I ask for an opportunity to examine, before it is finally concluded, under oath the members of the Committee. I would like to find out why it is that the several large financial institutions here are willing to take this pig."

Mr. Tuttle further said (R., 62):

> "The clients that I represent are opposed to this offer that has been suggested here, because there is, in these papers, nothing stated on which they can form any judgment at all, and the offer, as it stands is, in their judgment, simply—

> now, what I desire is an opportunity, such as we would have, in view of the fact that this is a bankruptcy, that we would have under the Bankruptcy Law, to proceed with the examination."

These very reasonable demands for a proper legal record before the District Court acted, were opposed by the specious and significant assertions that a delay of even twenty-four hours would be prejudicial (R., 116, 118, 38, 63). The result was that the District Court refused even a day's adjournment, and conducted only a perfunctory examination of White, the petitioners protesting their inability to proceed without time for preparation. As a matter of fact the respondents took two weeks to enter the order on the decision. (See our Main Brief, p. 18.)

We can readily illustrate the manner in which the respondents' brief has made statements unsupported by the Record or has taken these self-interested and hearsay assertions by themselves and their counsel and presented them to this Court as if they were established facts competently proven,—as distinct from mere talk and argument challenged by these petitioners. For example:

(1) The respondents' brief says (p. 14):

> "Creditors with claims aggregating approximately $850,000 out of the total listed liabilities of $1,072,000 affirmatively voiced their approval of the plan."

No page of the Record is cited for this assertion and the Record contains nothing at all to sustain it,—certainly no competent proof of its truth. On the contrary, the claims of counsel for the so-called Creditors Committee as to the number and amount of creditors approving the plan were vigorously challenged and put in issue by petitioners' counsel and no proof of these claims was

submitted (R., 66). The petition of the receiver presenting the White offer said that the Creditors' Committee "represent creditors whose claims aggregate $589,000" (R., 17).

(2) The respondents' brief says (p. 18):

> "It does appear on the record that the plan of reorganization was approved by 98% of defendant's 250 creditors."

No page of the Record is cited for this assertion; and, so far as we can ascertain, nothing of the kind appears anywhere in the Record.

(3) The respondents' brief says (p. 14):

> "That (Creditors) Committee directly represented merchandise creditors with claims aggregating $178,000 and bank creditors with claims aggregating $441,500."

It is true that counsel for the Creditors' Committee *asserted* that such was the fact (R., 72); but opposing counsel asserted the opposite, saying (R., 66):

> "I do not know whether it is proper at this time to set up, interpose the idea that this Creditors' Committee is not representative of the creditors; it does not represent either the majority in amount nor in number, as I understand it; and I have been at some pains to find that out."

Certainly no proof was submitted as to the number or amount of claims which the Creditors' Committee actually represented; and the Court did not grant the non-assenting creditors' request for an examination to determine the truth of the matter (R., 58, 62, 63).

Moreover, this statement of counsel to the Creditors' Committee is interesting as revealing that the non-assenting creditors (the petitioners) held claims ($117,077.57) nearly as large as the unsecured creditors thus

said to be represented on the Committee; whereas the secured banks' creditors were under charges of having received unlawful preferences,—charges which, as the Court of Appeals held, should have been investigated (R., 173).

(4) The respondents' brief says (p. 6):

> "It (the defendant corporation) employed between three and four thousand people (R., 68)."

This statement illustrates perfectly the impropriety of building up a so-called "Statement of Facts" based on excerpts from self-serving speeches to the District Court by interested parties. The citation in respondents' brief is to a speech by Dr. Sirovich. There was no suggestion even in his remarks that the corporation had been employing that number of people at the time when the receiver was appointed or within any recent time prior thereto.

Contrast this flat statement in the respondents' brief with what approaches the real truth of the situation, as disclosed in the following dialogue (R., 113):

> The Court: "How many people will you employ there, Mr. White, if you go back into business?
>
> Mr. White: Immediately would be four or five hundred."

(5) The Respondents' brief says (p. 20):

> "Requests for information made at the hearing by petitioner's counsel were complied with; an inventory was available and every question that was asked was answered."

Such an extraordinary assertion can scarcely be serious. Our requests for an adequate opportunity for an examination of the so-called Creditors' Committee, and as to the so-called appraisal, the circumstances sur-

rounding the White offer, etc. (R., 58, 62, 63, 112, 115-7, 106, 123), were futile in view of the Court's immediate acceptance of the White offer. The record discloses conclusively that there was no inventory, no appraisal, no enumeration of claims, and no report by the Receiver; and that not even a date had been fixed for the filing of claims (R., 138, 139, 141, 123). The Court did undertake to call Morris White to the stand for immediate examination; but these petitioners protested, and properly so, that such sudden action gave them no opportunity to conduct an effective examination even of him —and none at all to conduct the other examinations which were asked (R., 58, 62, 63, 72, 106, 112, 115-7, 123). (See page 18 of our main brief.)

Requests by these petitioners for information and dependable data were certainly *not* complied with (R., 52, 54, 55, 62, 106, 112, 123, 125, 127).

(6) The respondents' brief says (p. 8):

> "At the suggestion of that Committee, Mr. Moakes, the representative of the National Surety Company—the leading petitioner—became a member of the Committee ex officio (R., 72, 73). Mr. Moakes participated in all the deliberations of that Committee (R., 72, 73, 124) and himself stated at the hearing before Judge Knox:
>
> 'It is true I attended every meeting' (R., 124).
>
> Mr. Moakes further stated that he had submitted to the National Surety Company the Committee's various reports (R., 124)."

This is a misleading and inaccurate statement. Mr. Moakes said (R., 124):

> "Your Honor, I was not on the committee. * * * As I told them, I could not bind my Company in any way; that I would submit the entire report to my company; and I have submitted reports from previous meetings, where they discussed other

methods of reorganization and other methods of stock issue; and that is about all I can say."

(7) The respondents' brief says (p. 6):

> "Less than a year prior to the appointment of the receiver, the defendant owed more than $3,000,000 to its creditors (R., 74). That indebtedness had been reduced to $1,072,000 at the date of appointment of the temporary receiver (R., 135)."

But when were these alleged payments made, and who got the benefit of the possible preferences resulting therefrom? Even this scanty record discloses the admissions of counsel for the Creditors' Committee that the informal "friendly receivership" by a committee of creditors antedated by some five months the formal receivership on April 6, 1931; and that, during this period of five months, $750,000 was paid out to certain creditors, so that the cash in the treasury was stripped down to $5,614.60 (R., 74, 75, 107, 121, 134). The record also discloses the admission that during that period the bank creditors had their claims paid down and received receivables as security (R., 173, 19, 49, 50, 53, 121). The circumstances of these payments should have been the subject of thorough judicial inquiry,—and in a court of bankruptcy they certainly would have been thus inquired into. Our demands for such an inquiry were defeated by the Court's almost immediate acceptance of the White offer (R., 58, 62, 63).

(8) The respondents' brief says (p. 9):

> "Approximately $250,000 of the accounts receivable have been pledged as collateral to banks for loans concurrently made (R., 134, 72)."

On page 134 of the Record is the accountants' report. There is nothing there to show that the receivables had been pledged concurrently with loans made. Nothing was

submitted to the court to support the statement to that effect by Mr. Weisman at page 72 of the Record. This was one of the matters which the Circuit Court of Appeals thought should be inquired into for the purpose of determining whether unlawful preferences had been created (R., 173).

(9) The respondents' brief says (p. 9):

> "Thus it appears that, on the date of the appointment of the receiver herein, there were preferred charges against the estate for approximately $200,000, to be satisfied prior to distribution to general creditors."

This is not correct. The U. S. Government said that its claim was $90,000 for undisputed items (R., 70). White's accountants said that it was $80,624.36 (R., 134). The State only claimed $57,000 according to White's attorney (R., 50). The accrued payroll was $16,388.04 (R., 134). This makes in the aggregate only $163,388.04.

(10) The respondents' brief says (p. 11):

> "The Holding Company was threatened with the foreclosure of a blanket second mortgage *and unsecured creditors of that company had filed a petition in bankruptcy against it.*"

We can find nothing in the record to support this statement. The fact is, if we follow counsel outside the record, that the petition in bankruptcy was filed by Mr. Glass on behalf of the Irving Trust Company as receiver of Morris White, Inc., and that the adjudication was consented to on behalf of the corporation by Mr. Stern (White's counsel on this Record).

(11) The respondents' brief, at pages 8 and 9, refers to the statements of assets and liabilities prepared by Klein, Hinds & Finke, accountants, as of April 6, 1931. But the brief fails to mention that these so-called amounts were merely aggregate book amounts, to wit,

mere figures taken from the books themselves. No one has claimed that this statement of books amounts had any relation whatever to reality;—indeed, every one has conceded that it did not (R., 62, 90, 91, 95, 100, 101, 118, 119).

(12) The respondents' brief, on page 10, refers to a statement of Mr. Morris White that in April, 1930, the Morris White Holding Company had raised two and one-quarter million dollars upon its properties by loan from the S. W. Straus & Co. and had turned that amount over to the defendant corporation.

But the brief does not call attention to the fact that the very accountants' statement as of April 6, 1931, which the respondents themselves gave to the District Court and which was taken from the books of the defendant corporation itself, does not list this transaction in any way. On the contrary, it shows, among the so-called assets, liabilities to the corporation from associate companies in the sum of $2,277,714.89 (R., 134). Indeed, the respondents' brief admits (p. 10) that the Morris White Holding Company is indebted to the Morris White Inc. in the sum of $1,700,000.

(13) The respondents' brief says, at page 14, that after the publication of the notice several prospective purchasers "examined the assets (R., 127) but no other bidder appeared (R., 151)."

All that the record says is that Mr. Glass, counsel for the Receiver, said that "some prospective purchasers" examined the "stock" with a view to bidding for the assets (R., 127).

(14) On page 15 the respondents' brief tries to work in the name of Carter, Ledyard & Milburn, and cites the Record, pp. 66, 67. There is nothing in the record (so far as we can find) to show that Carter, Ledyard & Milburn ever appeared in this case at all, and there is nothing in the record to show that Mr. Lyeth of that firm ever attended any hearing anywhere on this matter.

II.

Respondents' statements outside the record.

Certain statements in respondents' brief outside the record have already been mentioned. We now give one more example.

At page 18 the respondents' brief asserts that because, ending with the year 1929, Morris White Inc. had made annual profits averaging about $500,000 a year (according to the *ex parte* assertion of Mr. White's counsel, R., 90) "the reorganized corporation within two years would have been able to discharge in full its $1,000,000 of liabilities."

This statement borders, we submit, upon the absurd as well as carrying implications which are off the record. The fact that before 1930 the corporation had shown earnings argues nothing as to its possession of earning capacity after the financial catastrophe in the Fall of 1929 and the subsequent depression. Elsewhere in their brief (p. 6) respondents' counsel conceded that orders for millions of dollars had been cancelled "when the present depression began"; and, according to the admission of White himself, there was at the time when the receivership began "not a dollar" of orders on hand and the market was constantly falling (R., 51, 102). White himself was bankrupt; his outstanding investment in the stock of the Bank of United States had been turned from an asset into a liability; and his real estate ventures in which he had lost, according to the admission of counsel, some $20,000,000 were bankrupt (R., 120, 86, 91, 67, 131). The defendant company itself was down to about $5,000 in cash, whereas its liabilities were over $1,000,000 (R., 32, 52, 134-5).

It is surprisingly audacious, therefore, for the respondents' brief to argue that in May 1931 this defendant company had a goodwill which (p. 18)

> "within two years would have been able to discharge in full its $1,000,000 of liabilities".

As a matter of fact, the records of the District Court show that on April 29, 1932, the Morris White Handbags Corporation was itself declared bankrupt, and that by decree dated June 6, 1932, the Irving Trust Company as trustee of its assets was directed to sell them and they were sold for $53,850. See Decrees printed in the Appendix.

III.

The claim that we have raised points not presented in the petition for certiorari.

At page 3 the respondents' brief quotes from our petition for certiorari "the questions presented."

A comparison thereof with the points made in our present main brief shows that each one of the latter is embraced within the scope and subject matter of the former. In the petition for certiorari we certainly did argue in so many words that the case should not have been in equity but presented "a typical case for the Bankruptcy Act and for a rigid investigation under Section 21a" (pp. 4, 15); and that the Circuit Court of Appeals erred in confining the rights of the petitioners to an aliquot share of a theoretical sale as distinct from the rights claimed for the petitioners in our present main brief (pp. 15-20).

Moreover, the petitioners have a clear right to elaborate in their brief and argument on the questions mentioned in the petition for a writ of certiorari and to clarify and particularize the relief sought and even to add to or change the reasons urged for the reversal (*Meadows* v. *United States*, 281 U. S. 271). This Court is in no way precluded from considering the entire case (*Olmstead* v. *United States*, 277 U. S. 438, 455, 466).

IV.

The claim in respondents' brief that the dual function exercised by the receiver's counsel was not criticised below.

The respondents' brief says that the District Court appointed the complainant's counsel to be also counsel for the Receiver (p. 4); but we find in the record no such order nor any warrant for such assertion.

But however this may be, the respondents' brief wholly misconceives our position on this subject. We are not undertaking to appeal from any such order if there were one, nor to contend that it was void. Our contention is that the circumstance that the attorney and counsel for the dummy complainant of the Creditors' Committee also acted as the attorney and counsel for the Receiver was a potent circumstance illustrative of the true nature and purpose of this so-called friendly receivership; was good reason why it should "be watched with jealous eyes", to use the recent language of Mr. Justice Cardozo (*Michigan* vs. *Michigan Trust Co.*, 286 U. S. 334, 345); and was evidence that the true function of the receivership as a neutral agency was being "perverted" (*id*).

In other words, these dual and conflicting positions of the receivers' counsel were relevant circumstances in determining the good faith of the action and of the proceedings concerning the so-called White offer; in determining the weight to be given to the statements made by him in the record; and in determining whether or not the court below was right in confining these petitioners to an aliquot share of a theoretical sale after deducting the receivership expenses. (See pages 50 *et seq.* of our main brief).

V.

The respondents' claim that this Court cannot consider the impropriety of administering this estate in equity.

At page 4 the respondents' brief claims that this Court may not now consider the petitioners' arguments against the propriety of the administration of this estate in equity rather than in bankruptcy, because this Court denied a petition for a writ of certiorari to review the order of the Circuit Court of Appeals affirming the order of the District Court of June 3, 1931, appointing Irving Trust Company as permanent receiver.

The respondents forget that in their brief in opposition to the latter petition for a writ of certiorari they strongly urged that the order of the District Court making the receivership permanent recited the alleged fact of there being "no opposition to the making of said receivership permanent" (p. 4). They there argued that this recital was binding, and hence that there was nothing for this Court to review in connection with that order (p. 7). The present record, however, discloses that long before either the order of June 3, 1931 or the order of June 15, 1931 (the latter being the one now under review), counsel for these petitioners had filed with the District Court full affidavits alleging in so many words that "This case is not one justifying an equity receivership at all"; that "the Court has no jurisdiction to proceed in equity"; and that "deponent further prays that the complaint herein be dismissed and the receivership vacated" (R., 137).

Certainly there is nothing in the present record to bar this Court in any way from determining that at the time when this order of June 15, 1931 was entered over the objections urged in the said affidavits filed on May 27, 1931 (R., 135-141), this case should not have continued

to proceed in equity. Certainly also there is nothing in the present record to prevent this Court from holding that in any event the rights of the parties should have been determined as if the case were in bankruptcy. (See p. 39 of our main brief).

This Court has recently held in *Michigan ex rel Michigan Trust Company* v. *Haggerty*, 286 U. S. 334, 345, that these so-called "friendly" equity receiverships for alleged conservation "are to be watched with jealous eyes lest their function be perverted." Such watchfulness could not be practiced if the Court were concluded by prior orders and could not act to suppress a receivership where it discovered that suspicion had ripened into conviction.

VI.

Reply to the First Point of Respondents' Brief (p. 25).

(1) The respondents wholly misconceive the decision of this Court in the *Boyd* and *Kansas City Railway Co.* cases.

In both those cases there was an actual public sale at auction, preceded by full inventory, appraisal and public advertisement. In both cases the reorganizing group was obliged to bid an actual amount at the auction sale, with the consequence that they ran the risk of competition, and the results of the sale were subject to report to and confirmation by the court. In both cases the sale was at a price less than the secured debts. (See the *Boyd* case, 228 U. S. 482, 490, 491; and the *Kansas City* case, 240 U. S. 166, 173.)

The question before this Court was whether the auction sale, valid as between the parties and the public generally, was a bar to pursuit of the assets by non-assenting unsecured creditors. What this Court held was that *not even the auction sale was any such bar* where the non-assenting unsecured creditors had been tendered no fair equivalent for their proportionate interest.

In the present case, there was no public sale at all, and certainly there was no inventory, appraisal, advertisement and upset price. Nothing was paid or intended to be paid into the treasury of Morris White, Inc. There is nothing in the opinion of this Court in either of these cases that such a sale with such accompaniments can be dispensed with on mere tender to non-assenting creditors of stock or other securities of the new company. Surely, at the very least, non-assenting creditors are entitled to a public sale with the accompaniments of advertisement, inventory, appraisal, and upset price. At the very least the reorganizing group must be required

to go into the open market and subject their bid to open competition under the safeguards of a public auction. At the very least the non-assenting creditors are entitled to the chance that such an auction will develop into a genuine sale with price and terms commensurate with the actual value of the property. At the very least the non-assenting creditors are entitled to their day in court on the subsequent effort of the reorganizing group to have such a sale judicially confirmed.

The reason why in the *Boyd* case the actual auction sale provided no cash for the non-assenting unsecured creditors was that the price bid by the reorganizing group pursuant to the reorganization plan "was less than the secured debts" (228 U. S. 482, 490). Since the reorganization plan combined the old secured creditors and the old stockholders, this Court held that the sale was as against unsecured creditors "a mere form" whereby nothing actually had been changed.

In the present case, however, an actual sale would have required the reorganizing group to pay some cash because there were no mortgage bonds at all and all creditors would have had an equal right to seek a pro rata share out of the purchase price.

By dispensing altogether with any such sale the District Court deprived the non-assenting creditors of these rights and of the well-grounded chance that by a public sale accompanied with proper advertisement, inventory and appraisal and subject to subsequent confirmation by the court a substantial price commensurate with the real value of the property would have been realized.

(2) There is nothing in the *Boyd* and *Kansas City Railway* cases, by way of dictum or otherwise, to indicate in any way that this Court held that without a public sale with proper accompaniments, the rights of unsecured creditors to follow the assets could be barred in any way.

There is nothing in either case, by way of dictum or otherwise, which supports in the slightest degree the proposition for which they are cited in the respondents' brief, to wit: (p. 26) "The power of the federal courts in equity receiverships to compel creditors to accept something other than cash in satisfaction of their claims is firmly established".

The language quoted in the respondents' brief from the opinions in those cases to the effect that if an unsecured creditor "declines a fair offer, he is left to protect himself as any other creditor of a judgment-debtor", means simply that where such a public sale has occurred and in consequence title has been transferred to the purchaser, the creditor cannot thereafter go behind the purchaser's judicially confirmed title and pursue the assets merely because the purchase was made pursuant to a "reorganization plan". All that this Court held was that such right of pursuit existed only where such reorganization plan does "recognize and preserve any interest of the stockholders without also recognizing and preserving the interest, not merely of the mortgagee, but of every creditor of the corporation" (228 U. S. 482, 505).

In short, nothing said by this Court in either of those cases even intimates that without such a public sale with proper accompaniments a court of equity may, by mere fiat, cut off and nullify the contractual rights of creditors and substitute for them stock or securities in some other venture.

(3) In the present case, there was really no sale at all,—certainly no public sale accompanied by inventory, appraisal, adequate advertisement and upset price. The decree of the District Court did not undertake to appraise, fix or determine either the identity or the value of the assets of the defendant corporation (R., 151). It made no inventory or appraisal and referred to none. It fixed no upset price. It referred to a "purchase" but

such purchase was, to use the language of the *Boyd* case (p. 506), "a mere form". The decree slightly "changed the name but not the relation" (p. 507); and "the circumlocution did not better" the title of Morris White or his new corporate embodiment as against non-assenting creditors (pp. 506-7).

(4) The other railroad cases cited by respondents do not in any way dispense with the necessity of a public sale or do not at all sustain what the respondents assert to be (p. 27) "the power of the federal courts in equity receiverships to compel the creditors to accept something other than cash in satisfaction of their claims". All that they hold is that where there has been such a public sale a creditor cannot go behind the judicially confirmed title of the purchaser and follow the assets simply because the purchase was made pursuant to a plan of reorganization unless such plan preserves the interest of the stockholders without fairly recognizing those of the unsecured creditors.

The *Phipps* case, 284 Fed. 945, may be the sole exception. Undoubtedly that decision was influenced by the fact stressed in the opinion that the insolvent was a railroad company, with the consequent public interest in keeping it going. The constant assertion in that opinion that judicial sales were unnecessary because in the *Boyd* case and the *Kansas City* case this Court held that the reorganization plans "were voidable by creditors, notwithstanding such judicial sales thereunder" (p. 952), is, we submit, a curious perversion of the decisions of this Court. This Court did not hold that title could be transferred otherwise than by a public sale, but merely that *notwithstanding the transfer of title by judicially confirmed public sale*, the non-assenting creditors could, under certain circumstances, follow the assets in the hands of the new corporation.

The decision in the *Phipps* case stands alone and has been regarded as one of very doubtful validity. See

Legislative Basis of Corporate Reorganization, 80 Penn. Law Review, 579, 583. In *Harding* v. *American Sumatra Company*, 14 F. (2) 168, the court referred to the decision in the Phipps case as follows (p. 169):

> "There was no judicial sale in the case last cited and no transfer of the assets to another corporation, but a mere adjudication that the creditors and stockholders must take what was provided in the reorganization, or nothing, notwithstanding that the reorganization was arranged for while the court was holding them off from asserting their ordinary legal rights. *This is a stretching of equity power beyond everything previously known, and quite beyond the intimations in the Boyd* case, at page 508 (33 Sup. Ct. 554) repeated in *Kansas City R. R.* vs. *Central Union Trust Co.*, supra. To deprive a creditor of his usual remedies and force him into membership in the corporation which he only credited seems to be *of very dubious correctness*, however convenient and cheap it may be to reorganizers, and however justly disappointing to recalcitrant minorities, who may be trying to force the majority to buy them out to get rid of them."

The *Phipps* case suggests two additional considerations. In the first place, if an unsecured creditor can be deprived of his right to cash as in the *Phipps* case by mere fiat of a court of equity, there is no reason why, in a similar case, the same rule should not apply to an unsecured creditor such as a bondholder. In the second place, even if, as claimed in the *Phipps* case, "judicial sales are futile" in the case of a large railroad, such as Chicago, Rock Island and Pacific Railway Company, no such generalization can be made concerning judicial sales of the assets of industrial corporation of small or moderate size. This Court evidently felt uncertain about the correctness of the *Phipps* decision, for it granted a writ of certiorari (261 U. S. 611); but the case was finally dismissed by stipulation of counsel (262 U. S. 762).

(5) The respondents' brief concedes that it can cite no precedent at all for its proposition that in an equity receivership of *an industrial corporation* the court has "power to compel creditors to accept something other than cash in satisfaction of their claim."

The respondents contend that if such a power exists in the case of a public utilities corporation, it should also exist in the case of a private industrial corporation. Respondents, however, overlook that a quasi-public corporation (such as a railroad) is outside the bankruptcy law, and therefore its insolvency administration must be in equity or be nowhere; and that one who loans money or credit to a quasi-public corporation may possibly be said to have affected it with a public interest and to subject it in part to the public's proprietary interest in the enterprise as represented by the public franchises. (See pp. 26 and 27 of our main brief.)

This very distinction has been drawn during this very month by this Court in *Shapiro* v. *Wilgus* (decided December 5, 1932) where, speaking for this Court concerning so-called friendly receiverships at the suit of simple contract creditors, Mr. Justice Cardozo said:

> "This (appointment of receivers in such cases) is done not infrequently where the defendant is a public service corporation and the unbroken performance of its services is in furtherance of the public good. *Re Metropolitan Railway Receivership,* 208 U. S. 109, 111."

In the present instance, the defendant corporation was subject to the Bankruptcy Act, and a sale of its assets was required by that Act prior to any distribution to creditors and stockholders.

In making these observations, we in no way abate our claims that even in the case of quasi-public corporations there is no such power in a court of equity as the respondents claim; and that the White offer grossly violated "the fixed principle" established by the *Boyd* case.

(6) The respondents argue (p. 33) that "our present regime of 'big business'" and the present depression should cause a court of equity suddenly to clothe itself by judicial fiat with the power, never before exercised, to nullify the contractual rights of creditors in the case of insolvent industrial corporations.

In other words, the respondents seem to think that the era of "big business" on the one hand and the present financial depression on the other may collectively or separately be regarded as now affecting investments in industrial enterprises with that element of public interest which heretofore has enabled the law and the legislatures to treat quasi-public corporations somewhat differently than industrial corporations. Such a doctrine would have startling consequences and revolutionize much well-settled constitutional law.

What the respondents really mean is that in the case of industrial corporations, the courts, through equity receiverships, should go beyond the settled power to provide a moratorium in proper cases and proceed to a wholesale nullification.

But the respondents do not tell us where the courts would get authority for so sudden an assertion of so new a power. We do not see how it could possibly come into existence until after an act of Congress following an amendment of the Constitution; and its disastrous consequences to the credit of industrial corporations is obvious enough. (See our main brief, pp. 27, 28).

Nor does it follow that the existing rule enables "a single creditor" (as the respondents contend, p. 33) "to destroy such enterprises by forced liquidation for cash." The reorganizing group of creditors need not provide at the auction sale any net amount of cash greater than necessary to pay the expenses and to pay the non-assenting creditor his proportionate share of the proceeds of such sale. The risk that they run is that some one will compete with them in the bidding; but the benefit of just

such competition is the contractual right of every creditor and a requirement of sound public policy.

Furthermore, if the "depression" is to be considered, how about the need of these surety companies, and indeed of any other non-assenting creditors, to a speedy liquidation in cash of their claims? It may be disastrous to them to receive nothing but paper on which nothing can presently be realized. Again, such paper is not, under the laws of the State of New York, lawful investment for surety companies and would not be passed by the Superintendent of Insurance. They will be obliged to go out of this class of business if paper of this character can be forced upon them whenever there is default by an industrial corporation.

(7) The respondents' brief declares that the courts must, under present conditions, assume special powers for "salvaging what they can out of a financial or commercial wreck" (p. 37).

This is a strange contradiction of the picture which the respondents attempt to draw elsewhere in their brief of the defendant corporation at the time when the White offer was presented. It was the consciousness by these petitioners of the fact that Morris White had indeed made of this corporation "a financial or commercial wreck" that impelled them to refuse to give up their claims and to refuse to take stock in what they deemed to be a crazy and impossible venture which speedily went into bankruptcy. (See Appendix A hereto.)

The Bankruptcy Law expresses the public policy of the United States for the liquidation "of a financial or commercial wreck"; and the respondents' brief concedes that under the provisions of that Act "a reorganization of the sort we are discussing" could be worked out (p. 36). The milk in the cocoanut is that those engineering this "friendly equity receivership" desired to avoid the sale required by the Bankruptcy Act in the case of reorganization.

(8) The reference in respondents' brief (p. 35) to the Solicitor General's report proposing a revision of the Bankruptcy Act is most unfortunate for the respondents, because an examination of the section on "corporate reorganizations" as proposed by the Solicitor General (see his report pp. 90-3) shows that it requires all the safe-guards and conditions which were absent in this case, to wit: an inventory, an appraisal, a preliminary enumeration and determination of claims, an advance judicial estimate of the true value of the property and either a sale "at not less than a fair upset price" or else an "appraisal and payment in cash of the value of the claims of the non-assenting creditors". In the latter event, adequate security for such payments must be provided in advance of the consummation of the plan. Had such procedure been followed in this case, the decree of June 15, 1931, would never have come into existence.

(9) The respondents' brief argues that the White offer presented a plan which fairly gave "recognition to creditors and stockholders substantially in accordance with the respective ranks and equities of their claims" (p. 38).

We fail to understand how such an assertion can be made. On the preceding page the respondents' brief has argued about this case as one of salvage "out of a financial or commercial wreck" (p. 37). That the picture was actually one of bankruptcy is obvious. (See our Main Brief, p. 15). Bankruptcy in fact speedily overwhelmed the new so-called reorganized enterprise under its new name. (See Appendix A hereto annexed).

What, in consequence, was the "equity" of the stockholder (Morris White) of the Morris White, Inc., on June 15, 1931? Certainly the decree then entered by the court gives us no clue to this question. It makes no appraisal, calls for no inventory, gives no value and provides not even an upset price. It is a mere collection of benevolent characterizations and prophecies (speedily

proven ill-founded) about the desirability of a "going concern" and the White offer providing "a better opportunity" and being "fair and equitable" (R., 152). A mere glance at the White offer shows that the so-called reorganization was really for the benefit of Morris White, the stockholder; and we see no necessity for adding to what we have said on this subject at pages 6-11 of our Main Brief.

(10) The respondents' brief states (p. 41):

> "Thus the consent of one of the two directors representing the preferred stock is required to give the common stock the right to elect a majority of the board of directors."

This is not the fact. The respondents have confused a provision about salaries with the matter of electing directors. The right of the common stockholders to elect a majority of the board of directors (so long as White remains active in the corporation) is repeatedly expressed and is unqualified (R., 21).

The respondents' brief further says (p. 40):

> "All the stockholders of the old corporation receive is a reversion after the creditors are paid in full."

This also is not the fact. See pages 8-11 of our Main Brief.

In all cases cited by the respondents the reorganization plan required the stockholders who went into it to provide additional capital; and the fact that they did thus subscribe new money was considered in weighing the comparative fairness of the provisions in the plan for creditors. In the present case, however, the stockholder contributed no new money at all. He was the only one in the plan who gave up nothing; and hence he had everything to gain and nothing to lose. The only payment made was by the creditors for it is they only who con-

tributed anything,—to wit: 80% of their claims. The stockholder, on the other hand, got control of the corporation; received the privilege of giving himself a salary as high as $60,000 a year; and was enabled to set aside two-thirds of the current earnings as a reserve for the common stock. See our Main Brief, pp. 7-11.

VII.

Reply to Respondents' Second Point (p. 46).

We believe that most of the arguments in the respondents' Second Point have been anticipated by us in our Main Brief.

(1) The fundamental argument in that Point seems to be that the Circuit Court of Appeals "did no more than what courts of equity have repeatedly done under the guise of fixing an 'up-set price'" (p. 54). We fail to see the fact or the relevancy of the attempted analogy.

An up-set price is arrived at by the making of a complete inventory, an honest and fair appraisal and an estimate of the minimum amount which the property should fairly bring. It starts the point at which bidding must begin. It preserves to all interested in the corporation the benefits of competitive bidding and the chance (which by proper preliminary advertisement may be quickened into a probability) that a better price will be realized. On the other hand, the course pursued by the Circuit Court of Appeals eliminates as an actuality all these safeguards, none of which were even attempted by the decree of June 15 (R., 151); and it throws upon the non-assenting creditors the prohibitive burden and expense of endeavoring to demonstrate speculatively what would have been realized under conditions not reproducible and entailing consequences no longer knowable.

A figure thus arrived at, not through the simple test of an actual sale under proper conditions but as more or less of a guess at an abstract conundrum, is not in any sense an "up-set price." It is neither "up-set" nor "price." It is not "up-set" because it is not a minimum but a maximum: it provides no opportunity for greater realization. It is not a "price" because there is no sale:

it is a mere guess as to the results of a past event which never happened.

If there ever were circumstances under which, as said by this Court in the *Boyd* case, 228 U. S. 482, 507, it was necessary to decide "*according to a fixed principle,* not leaving the rights of creditors to depend upon the balancing of evidence as to" the estimated value of the property, this is such a case. Otherwise, the non-assenting creditors have thrown upon them a burden of legal procedure and of proof which may far exceed in time and cost any possible realization; and the assenting creditors are given every inducement to claim that the actual value of the assets was far below the value upon which the capitalization of the new company was based,—an injustice and an inconsistency expressly commented on by this Court in the *Boyd* case (pp. 507-8).

(2) The respondents' brief (p. 53) says that the Circuit Court of Appeals did no more than is proposed in the new Section 76 of the new Bankruptcy Act offered by the Solicitor General to Congress.

This reference is unfortunate for the respondents, because the proposed new section expressly requires an advance valuation of the property based upon proper inventories and appraisals made in advance,—a procedure to be conducted with the property before the Court and at the expense of the estate as a whole.

(3) The respondents' brief further says (p. 56) that since the assets were transferred pursuant to the decree of June 15, 1931, and the plan of reorganization then became operative, these petitioners in some way lost the rights which they otherwise were entitled to and must be confined to the very dubious and wholly theoretical privileges given them by the decision of the Circuit Court of Appeals.

This argument overlooks the fact that notice of appeal was given on June 16, 1931, and the appeal was allowed on the following day (R., 157-9). If the respondents saw fit in the face of this appeal to proceed with the so-called reorganization and to exchange their claims for securities of the new corporation, they did so with their eyes open, and it is they and not these petitioners who should suffer the embarrassments consequent upon any reversal of the decree of June 15, 1931. See pp. 33 *et seq.* of our main brief.

VIII.

The petitioners wish to make their position clear that they are appearing here in behalf of themselves and not in behalf of others, and that they are asking a reversal as to themselves. In short, the petitioners ask for a reversal with affirmative directions that they be allowed to recover their claims in full, just as the non-assenting creditors were allowed to recover their claims in the *Boyd* case and in *Shapiro* v. *Wilgus,* decided Dec. 5, 1932 (see our Main Brief, p. 33, et seq.).

IX.

With the Court's permission, we will be pleased to hand up, as an addendum to our reply brief, such parts of the subsequent proceedings in *Coriell* v. *White* and in the Handbags and White Holding Co. bankruptcy proceedings as we believe essential to a proper perception of the realities of this case, with the right reserved to our adversaries to hand up such parts as they deem essential on their side.

Dated New York, N. Y., December 14, 1932.

CHARLES H. TUTTLE
of New York

GREGORY HANKIN
of Washington

SAUL S. MYERS
of New York

Counsel for Petitioners.

APPENDIX A.

Adjudication of bankruptcy as to Morris White Handbags Corp.

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER *of* MORRIS WHITE HANDBAGS CORP., *Alleged Bankrupt.*	Invol. Pet. filed— April 13th, 1932. IN BANKRUPTCY No. 53927 Bankrupt's address: 621 Sixth Ave., New York City.

At New York City, in said District, on the 29th day of April, A. D. 1932, before the Honorable FRANK J. COLEMAN, Judge of the said Court in Bankruptcy the petition of SOLOMON J. SALWEN, NATHAN SALWEN and SIMON SALWEN, copartners doing business as SALWEN PAPER CO., et al., that MORRIS WHITE HANDBAGS CORP., be adjudged bankrupt, within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard and duly considered, and the said alleged bankrupt having appeared and consented to adjudication the said MORRIS WHITE HANDBAGS CORP., is hereby declared and adjudged bankrupt accordingly.

AND IT IS FURTHER ORDERED that the said bankrupt file schedules in triplicate as required by law within ten days from the date hereof.

AND IT IS FURTHER ORDERED that the said matter be referred to P. B. OLNEY, JR., ESQ., one of the referees in

bankruptcy of this Court to take all such further proceedings therein as are required by said Acts of Congress, and all such acts therein as the Court might take or perform, except such as by law or the general orders of the Supreme Court are required to be performed by the Judge; and that the bankrupt shall attend before said referee on the 4th day of May, 1932, at 10 o'clock a. m., and thenceforth shall submit to such orders as may be made by said referee or by the Court relating to said bankruptcy.

WITNESS, the Honorable FRANK J. COLEMAN, Judge of the said Court, and the seal thereof, at the City of New York, in said District, on the 29th day of April, A. D. 1932.

CHARLES WEISER (Sgd)
Clerk.

APPENDIX B.

Decree directing sale of the tangible assets of Morris White Handbags Corp. for $53,850.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER *of* THE MORRIS WHITE HANDBAGS CORP., Bankrupt.	IN BANKRUPTCY No. 53927

Upon reading and filing the application of the Irving Trust Company, as trustee herein, made on or about the 25th day of May, 1932, and the order to show cause dated the 25th day of May, 1932, and due notice having been given as provided in said order and by Section 58 of the Bankruptcy Act and by the rules of this Court and upon the appraisal heretofore duly filed herein, the inventory of the Irving Trust Company as Receiver duly filed herein and all the proceedings heretofore had herein and the said meeting provided for in said order to show cause having duly taken place on the 6th day of June, 1932, before Hon. Peter B. Olney, Jr., Referee in Bankruptcy, at his office No. 19 Rector Street, Borough of Manhattan, City of New York, as provided in said order, and the said sale having been made subject to the terms of sale dated June 6th, 1932, as read and filed at said meeting, and the offer of Human Cuttler, in the sum of $53850, being the hignest offer received, and no objection having been made, and it appearing that it is to the best interest of this estate to accept said offer,

Now, on motion of Proskauer, Rose & Paskus, attorneys for the Trustee, it is

Ordered that the said sale of all of the right, title and interest of Irving Trust Company, as Trustee of the above named bankrupt and only as Trustee in and to the goods, wares, merchandise, raw material, furniture, fixtures and machinery belonging to the estate of the said bankrupt and as contained in the inventory of the Irving Trust Company, Receiver, duly filed herein on or about May 10th, 1932, and marked therein Schedule A, lots 1 to 597 inclusive, to the said Human Cuttler for the sum of $53850.00, and the said terms of sale be and the same hereby are in all respects confirmed; and it is further

Ordered that the Irving Trust Company, as Trustee herein be and it hereby is authorized and empowered to make, execute and deliver any and all documents and to do any and all other acts that may seem advisable to it to carry into effect the said sale hereby confirmed; and it is further

Ordered that the said sale of the said property be and it hereby is directed to be and is hereby deemed to be free and clear of all liens and claims, if any, of any creditor, the United States, Collector of Internal Revenue for the Second District of New York, the State of New York, the Department of Taxation and finance of the State of New York or any other person or corporation and that all such liens or claims, if any, in, to or on the said property or any part thereof be and the same hereby are transferred to the proceeds of the sale; and it is further

Ordered that for the purpose of determining what sum of money shall be allocated to each item or lot of property as contained in Schedule A of the inventory of Irving Trust Company, Receiver, duly filed herein and

marked thereon as lots 1 to 597 inclusive, the sale of which is hereby confirmed, each item or lot of property shall be deemed to be worth the same percentage of the appraised value as contained in the appraisal duly filed in this proceeding that the total sale price bears to the total appraised value of the said property, the sale of which is hereby confirmed; and it is further

ORDERED that the marshalling of the proceeds of the said sale be and it hereby is reserved for the further order and disposition of this Court; and it is further

ORDERED that the segregation of the assets belonging to this estate as contained in the inventory of the Irving Trust Company, Receiver duly filed herein into property of Morris White, Inc., which property was transferred to The Morris White Handbags Corp., the bankrupt herein, and into property of The Morris White Handbags Corp., the bankrupt herein, which property was not transferred to The Morris White Handbags Corp. from Morris White, Inc. be and the same is hereby approved and confirmed.

Dated, New York, June 6th, 1932.

PETER B. OLNEY, JR.,
Referee in Bankruptcy.